No. _____

In the Supreme Court of the United States

ADAM FRIEDRICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decisions of the Court of Appeals and the federal district court violate the requirements of the Supreme Court decision in *Fedorenko* by failing to take into consideration the entire circumstances of the Respondent's service in the German Waffen SS during World War II.

PARTIES TO THE PROCEEDINGS

The Petitioner is an individual, Adam Friedrich. The Respondent is the United States of America.

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OPINIONS BELOW

The opinion of the Eighth Circuit (App. B, p. 3a) is reported as *United States v. Friedrich*, 402 F.3d 842, *rehearing denied* (8th Cir. 2005), and the decision of the United States District Court for the Eastern District of Missouri, 305 F. Supp. 2d 1101(2004) is included in the Appendix (App. C, p. 10a). The opinion and order of June 13, 2005, of the Eighth Circuit, denying Petitioner's Motion for Rehearing, is also included in the Appendix (App. A, p. 1a).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on March 31, 2005. The Court of Appeals entered its order denying a timely petition for rehearing and petition for rehearing en banc on June 13, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of persecution as found in the Refugee Relief Act, Pub. Law No. 203, 67 Stat. 400, as amended, 68 Stat. 1044 (1954). It also involves the definition of persecution of others as found in 8 U.S.C. 1101(a)(42) (concerning eligibility for political asylum) and 8 U.S.C. 1231(b)(3)(B) (concerning eligibility for withholding of deportation).

STATEMENT OF THE CASE

Adam Friedrich was issued a visa on February 10, 1955, which allowed him to be inspected and admitted to the United States and naturalized pursuant to 8 U.S.C. Sec. 1427(a) (Sec. 316(a) of the 1952 Act) by order of the district court in St. Louis on May 4, 1962.

The Government, represented by the Office of Special Investigations (OSI), Department of Justice, filed a Complaint demanding revocation of the order admitting Adam Friedrich to citizenship and canceling the certificate of citizenship on the ground that his naturalization was illegally procured pursuant to 8 U.S.C. Sec. 1451(a). This case may be found at *United States v. Friedrich*, 305 F.Supp 2d 1101 (2004). The district court opinion was upheld in a decision reported as *United States v. Friedrich*, 402 F.3d 842 (8th Cir.), *rehearing denied*, 2005 U.S. App LEXIS 11106 (8th Cir. 2005). This is a petition for certiorari from the latter decision.

REASONS FOR GRANTING THE WRIT

Whether the decision of the court below violates the requirements of the Supreme Court decision in *Fedorenko* by failing to take into consideration surrounding circumstances in making a determination of what constitutes persecution.

The *Federenko v. United States*, 449 U.S. 490, 101 S. Ct. 737 (1981), decision has been relied upon not only in the context of whether one has "persecuted others" during the time of the Nazi regime of World War II, but also regarding whether or not one is disallowed political asylum or withholding of deportation due to actions taken in recent conflicts. The Court has not addressed the issue of

persecution of others since *Fedorenko*, and it should consider the various decisions relying on *Fedorenko* to clarify and elucidate the footnote which is often cited when a definition of persecution is called for. Granting the writ in this case would give the Court an opportunity to resolve the conflicts of the various Courts of Appeals in interpreting this important decision, as well as give the federal courts and agencies who are charged with interpreting the term guidance as to its meaning in the various contexts in which it occurs.

Fedorenko v. United States, 449 U.S. 490 (1981), is the sole decision of the Court which has addressed the meaning of persecution during the time of the Nazi persecutions of World War II. In footnote 34, the opinion by Justice Marshall states as follows:

> The solution to the problem perceived by the District Court [in Fedorenko] lies not in "interpreting the [Displaced Persons] Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the persecutions of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave a concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the perecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case. . . .

Fedorenko v. United States, supra, at 513.

Rather than giving a definition of the term, this footnote states that determining persecution under the Displaced Persons Act is a line-drawing exercise. It has given courts latitude to find some individuals ineligible for benefits while finding others not to be disqualified in very similar circumstances. Seldom, however, have the courts or administrative agencies engaged in the type of exercise which ought to be carried out in a line-drawing situation. That is, they have not weighed the various nuances of the conduct of the individual against whom the disqualifying conduct is sought to be proved. The application of the *Fedorenko* footnote was at issue in the Eighth Circuit decision *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), which implicated the activities of a Guatemalan asylum applicant who had been required against his will to participate in activities which certainly seems persecutory in nature, including engaging in a firing squad where he stated he tried to aim somewhat away from the person targeted. The BIA denied asylum on the basis of his having engaged in persecution but the Eighth Circuit reversed and remanded for further consideration in light of *Fedorenko*.

In *Hernandez*, the Petitioner argued that the legal standard applied by the Board to his case was inconsistent with *Fedorenko*. 258 F.3d at 211. He pointed out that the *Fedorenko* decision requires an individualized analysis of his conduct and that the Board had done no such analysis in coming to the conclusion under the law of asylum that he had assisted in persecution to the extent that he was no longer eligible for asylum. The same may be said for lack of analysis of the courts below in this case. For example, the Court of Appeals (App. B at 5a) quotes a portion of the paragraph from which footnote 34 is referenced:

> "an individual's service as a concentration camp armed guard -whether voluntary or involuntary- made him ineligible for a visa." 449 U.S. at 512

However, neither the district court not the Court of Appeals goes into detail to examine the qualification of this pronouncement obviously placed on it by footnote 34.

Contrast this minimal analysis with the detail which the Eighth Circuit went into to discuss the activities of Hernandez. 258 F.3d at 808-10, 814-15. Although Petitioner has not seen the opinion of the Board of Immigration Appeals in *Hernandez*, it is evident from the circuit court's opinion in that case that the Board's decision "did not reflect the type of analysis required [by *Fedorenko*.]" *Id.*, at 814. Mentioning one incident in which Hernandez had participated with his guerrilla associates in an execution-style shooting, the Board held that such participation was "'adequate to indicate'" that Hernandez had assisted in persecution. *Id.* The Court in *Hernandez* goes on to state as follows:

> Without mentioning or analyzing other significant evidence that was relevant to Hernandez's culpability, [the Board] concluded that he had not met his burden of proving that he had not participated in persecution and that he was therefore ineligible for asylum and withholding of deportation.
>
> As the Board noted, the burden of proof shifts to an asylum applicant once evidence is presented to show a mandatory ground for denial. This does not mean, however, that a petitioner will necessarily be held responsible for any involvement with a persecutory group. Unlike the case of an asylum applicant, the burden of proof does not shift to the Respondent in

> immigration court to defend himself under the Holtzman Amendment, even though some evidence of assistance in persecution is presented. The government bears the burden to prove its case by clear, convincing and unequivocal evidence. [footnote by Petitioner] Rather a court must evaluate the entire record in order to determine whether the individual should be held personally culpable for his conduct for purposes of [the immigration law]. See *Fedorenko*, 449 U.S. at 512-13, n. 34.

This examination of the entire record is exactly what the District Court has not done in this matter. Accordingly, the Court should grant certiorari, set aside the decision of the district court, and then remand the case to allow it to fully and adequately determine the question of assistance in persecution pursuant to *Fedorenko*.

Just a few of the circumstances which the Board fails to discuss in its analysis are that (1)Petitioner never used his weapon to prevent an actual escape attempt (in fact, there was evidence that an escape occurred on his watch without his intervention), (2) the difficulty that Petitioner would have experienced had he attempted to leave once he was inducted (including the likelihood that he would have been apprehended and executed had he failed to report for duty), (3) the attempt of the Petitioner to first enlist in the German Army rather than the Waffen SS, but only to be turned away because he was not a German citizen, (4) the lack of sophistication and education of Petitioner, (5) the lack of knowledge on behalf of Petitioner when he was inducted that he would be serving at a concentration camp, (6) the systemization of the use of terror by the Nazis so that service as a guard at a concentration camp could appear to be a legitimate form of service to the German Reich, just as

important as service in the *Wehrmacht* or the fighting divisions of the *Waffen SS*, (7) Petitioner's low rank and lack of decisionmaking authority.

A number of circuit court decisions involving the issue of persecution in the context of service as a concentration camp guard, as here, have concluded with little discussion, that the service involved persecution. See, for example, *Shellong v. INS*, 805 F.2d 512 (7th Cir. 1986). On the other hand, other courts have not been so charitable to the government and have found the term ambiguous such that it was necessary to refer to the legislative history to determine the intent of Congress. *Petkiewytshch v. INS*, 750 F.2d 871, 879-80 (6th Cir. 1991). *See also Lapenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985). When these latter cases are considered, one wonders how their results can be squared with the results of the Seventh Circuit and others which have given short shrift to any discussion if the meaning of th e term persecution in cases involving Nazi concentration camp guards.

Eventually the meaning of the word "persecution" in Nazi concentration camp cases will no longer be relevant due to the deaths of those who might have been implicated in the activities of the Nazi regime of World War II. Due to lapse of time, the ones who are targeted for denaturalization under *Fedorenko* at the present time were the youngest recruits possible at the time of the war. Their youth at the time of their induction into the service of the Nazi regime ought to be a mitigating factor in their favor. They were not long-time Nazis, but more important, due to their advanced age and in many cases, ill health, the Court's action to consider this issue now is the last chance that there can be a review of the meaning of the term "persecution" in the context of these cases such as to be meaningful to persons such as Petitioner, who along with almost all of the others targeted have led

exemplary lives since immigrating to the United States, and whose children are native-born United States citizens who must bear the financial and emotional cost of their defense.

For all of these reasons, it is important for this Court to take the opportunity to address one or more of the following issues: (1) whether the meaning of persecution under the Refugee Relief Act is different from the meaning ascribed to it in *Fedorenko*; (2) regardless of whether the meaning of the term is the same, is the type of line-drawing analysis used in *Fedorenko* appropriate in a Refugee Relief Act case; and (3) what additional factors must or ought to be considered in determining persecution under the Refugee Relief Act beyond the sketchy description in *Fedorenko*'s footnote 34.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this Court grant the petition for writ of certiorari in order to consider the decision of the U.S. Court of Appeals for the Eighth Circuit below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1728

[Filed June 13, 2005]

United States of America, Appellee,	)
v.	)
Adam Friedrich, Appellant.	)

OPINION

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender did not participate in the consideration or decision of this matter.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1728

[Filed March 31, 2005]

United States of America, Appellee,	)
v.	)
Adam Friedrich, Appellant.	)

OPINION

WOLLMAN, Circuit Judge.

Adam Friedrich appeals from the district court's[1] order that he be denaturalized pursuant to 8 U.S.C. § 1451. We affirm.

[1] The Honorable Carol E. Jackson, Chief Judge, United States District Court for the Eastern District of Missouri.

I.

Friedrich was born in Romania in 1921. In 1941, he attempted to join the *Wehrmacht* (German Armed Forces) but was denied entry because he was not a German citizen. He instead volunteered for the *Schutzstaffel* (SS), and began active duty in October 1942. Following basic training, Friedrich was assigned to the Death's Head Battalion at the Gross-Rosen concentration camp in German-occupied Poland. Gross-Rosen had approximately 100,000 prisoners when Friedrich arrived in January 1943. The prisoners were used as slave labor in a nearby stone quarry and received inadequate food, clothing, and medical care. Nearly 1,500 died in the first five months of 1943.

In August 1943, Friedrich and other guards marched approximately 200 prisoners from Gross-Rosen to the Dyhenfurth concentration camp. Friedrich remained as a guard at Dyhenfurth until the camp was evacuated in January 1945. At that time, Friedrich and other guards marched approximately 1,000 prisoners more than thirty miles back to Gross-Rosen. The winter march took several days and the prisoners slept without blankets in open fields. Gross-Rosen was evacuated the following month, and Friedrich was among the guards who escorted approximately 1,000 prisoners to the Flossenbürg concentration camp. After walking for nearly a day, the prisoners were loaded onto unheated cattle cars for a rail trip that lasted more than a day. The prisoners were not provided with food or sanitation facilities during the trip and many did not survive. Friedrich served as a guard upon his arrival at Flossenbürg. When the camp was evacuated in April 1945, Friedrich accompanied prisoners on a march to the Dachau concentration camp. During the march, American soldiers overtook the group and Friedrich fled unnoticed.

In 1948, the United States began admitting certain European refugees for permanent residence, without regard to regular immigration quotas, under the Displaced Persons Act (DPA), Pub. L. No. 80-774, 62 Stat. 1009 (1948). Persons who had "assisted the enemy in persecuting civilians" were ineligible for visas under the DPA. *See Fedorenko v. United States*, 449 U.S. 490, 509-10, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). Two years later, Congress amended the DPA to provide in relevant part that:

> No visas shall be issued under the provisions of this Act . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or natural origin.

Pub. L. No. 81-555 § 13, 64 Stat. 219, 227 (1950). In 1953, Congress enacted a successor law to the DPA, the Refugee Relief Act of 1953 (RRA), Pub. L. No. 83-203, 67 Stat. 400 (1953), *amended by* Pub. L. No. 83-751, 68 Stat. 1044 (1954). The RRA provided that:

> No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

Pub. L. No. 83-203 at § 14(a), 67 Stat. at 406 (emphasis added).

In 1953, Friedrich applied for a visa under the RRA. He stated in his visa application that he had been in the German Army from 1942 to 1945 but made no mention of his service with the SS or his duty at the concentration camps. Friedrich was granted a visa in 1955 and subsequently was naturalized in 1962. After learning of Friedrich's involvement with the

SS, the United States sought to revoke his citizenship under Section 340(a) of the Immigration and Nationality Act of 1952, codified at 8 U.S.C. § 1451(a). The district court granted summary judgment to the government and revoked Friedrich's citizenship.

II.

We review *de novo* the district court's grant of summary judgment. *Mayer v. Nextel West Corp.*, 318 F.3d 803, 806 (8th Cir. 2003). In ruling on a motion for summary judgment, the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Id.*

The government carries a heavy burden of proof in a denaturalization proceeding and evidence justifying revocation of citizenship must be "clear, unequivocal, and convincing." *Fedorenko*, 449 U.S. at 505. Nonetheless, an illegally procured naturalization may be set aside. *Id.* at 506. A naturalization is illegally procured if an applicant fails to comply strictly with all of the congressionally imposed prerequisites to the acquisition of citizenship *Id.* One of these statutory prerequisites is that an applicant has been "lawfully admitted for permanent residence." *United States v. Negele*, 222 F.3d 443, 447 (8th Cir. 2000) (quoting 8 U.S.C. § 1427(a)). An individual is not lawfully admitted for permanent residence if he entered the country without a valid immigration visa. *Id.*

In *Fedorenko*, the Supreme Court concluded that under the plain language of the DPA, "an individual's service as a concentration camp armed guard--whether voluntary or involuntary--made him ineligible for a visa." 449 U.S. at 512.

As Friedrich points out, however, *Fedorenko* and nearly all other cases involving revocation of citizenship actions against former members or supporters of the Nazi regime arose under the DPA, not the RRA. The only case to address the RRA in this context is *United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996). Friedrich's primary legal argument is the same raised by the defendant in Lileikis: that the RRA's addition of the modifier "personally" to the DPA's prohibition against advocating or assisting in persecution decreased the class of individuals ineligible for permanent residence. *Id.* at 38-39.[2]

Friedrich contends that "in light of the need to impart some meaning to the word 'personally,'" we should interpret it to require that an applicant must have had a subjective mental intent to engage in persecution. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as having their ordinary, contemporary, common meaning. *United States v. Fountain*, 83 F.3d 946, 952 (8th Cir. 1996). We agree with the district court that nothing in the ordinary meaning of the word "personally" suggests that it connotes "having a subjective mental intent about."

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[2] The defendant in *Lileikis* had been the head of the Lithuanian internal security service during the Nazi occupation of Lithuania. *United States v. Lileikis*, 929 F. Supp. 31, 32 (D. Mass. 1996). The court observed that although it was "historically plausible" that "inclusion of the word 'personally' in the RRA was intended by Congress to extend immigration privileges to some war refugees who could not qualify for admission under the DPA," the defendant's activities "so clearly constituted 'personal participation' in persecution that the semantical contours of the word 'personal' as used in the RRA [were] irrelevant to his case." *Id.*

Friedrich also asserts that there is no evidence that he "engaged in individual acts of a persecutory nature such as whipping [or] beating." This argument misconstrues the statutory language. Qualifying words or clauses refer to the next preceding antecedent except when evident sense and meaning require a different construction. *Mandina v. United States*, 472 F.2d 1110, 1112 (8th Cir. 1973) (citing KARL LLEWELLYN, THE COMMON LAW TRADITION 527 (1960)). Accordingly, the modifier "personally" refers to "advocated" and "assisted" (which are connected by the disjunctive "or").[3] The pertinent question is therefore whether Friedrich "personally assisted" in persecution, not whether he engaged in direct persecution.[4]

We accept as true for purposes of our review Friedrich's contentions that he never saw a prisoner escape, never harmed a prisoner, never discharged his weapon while guarding prisoners, and never saw any prisoners die during the forced evacuation marches. Friedrich admitted, however, that he served as a Death's Head guard at the concentration camps and during forced marches, that he was armed during these duties, and that he had strict orders to shoot prisoners attempting to escape.

We have recently observed in a slightly different context that an armed Death's Head concentration camp guard, "by impeding prisoners' escape through his presence," was

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[3] The only other plausible statutory construction is that the modifier "personally" refers only to "advocated" and leaves "assisted" unmodified, an interpretation that is even less helpful to Friedrich.

[4] Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete. *United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999).

"actively and personally involved in persecution." *Negele v. Ashcroft*, 368 F.3d 981, 983 (8th Cir. 2004) (involving removal under the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E)). We see no reason to reach a different conclusion here. History provides us with a description of the conditions at Flossenbürg, one of the camps at which Friedrich's armed presence impeded the escape of prisoners:

> Flossenbürg concentration camp can best be described as a factory dealing in death. Although this camp had in view the primary object of putting to work the mass slave labour, another of its primary objects was the elimination of human lives by the methods employed in handling the prisoners. Hunger and starvation rations, sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezing, forced suicides, shooting, etc., all played a major role in obtaining their object. Prisoners were murdered at random; spite killings against Jews were common, injections of poison and shooting in the neck were everyday occurrences; epidemics of typhus and spotted fever were permitted to run rampant as a means of eliminating prisoners; life in this camp meant nothing. Killing became a common thing, so common that a quick death was welcomed by the unfortunate ones.

The Nürnberg Trial, 6 F.R.D. 69, 118 (1946) (quoting June 21, 1945, report of the War Crimes Branch of the Judge Advocate's Section of the 3d U.S. Army). By guarding the perimeters of the Gross-Rosen, Dyhenfurth, and Flossenbürg concentration camps to ensure that prisoners did not escape from these unspeakable conditions, Friedrich personally assisted in the persecution that occurred in those camps, within the meaning of the RRA. Because Friedrich's actions rendered him ineligible for a visa under the RRA, the

issuance of his visa in 1955 was void *ab initio*.[5] Accordingly, he was not lawfully admitted for permanent residence, and his subsequent naturalization was illegally procured.

The judgment is affirmed.

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[5] Friedrich suggests that we must provide *Chevron* deference to the 1955 State Department decision to grant him a visa. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Under *Chevron*, we must first consider whether Congress has directly spoken to the precise question at issue. *Id.* at 842. Because we have concluded that Congress intended the RRA to prohibit the State Department from granting a visa to an armed Death's Head concentration camp guard, the ultra vires agency decision to grant Friedrich a visa is due no deference.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 4:02-CV-1075 (CEJ)

[February 24, 2004]

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
ADAM FRIEDRICH,)
Defendant.)
)

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion for summary judgment. Defendant opposes the motion and the issues are fully briefed.

The United States brings this action to revoke the citizenship of defendant Adam Friedrich under Section 340(a) of the Immigration and Nationality Act of 1952, (INA) 8 U.S.C. § 1451(a). Friedrich entered the United States in 1955 pursuant to a visa obtained under the Refugee Relief Act of 1953 (RRA), Pub. L. No. 203, 67 Stat. 400 , as amended, 68 Stat. 1044 (1954), and obtained naturalization thereafter. It

subsequently became known that Friedrich had been a member of the Waffen SS during World War II and that he had served as a guard at three German concentration camps. The government contends that Friedrich's service in the Waffen SS made him ineligible for a visa under the RRA and therefore ineligible for naturalization.

I. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party

will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

II. Background[1]

Defendant Adam Friedrich was born in 1921 in Hatzfeld, Romania, to ethnic German parents. To avoid entering the Romanian army, Friedrich illegally crossed the border into Yugoslavia in 1941. He remained there for about two months before being employed by the East German Agricultural Company as a laborer. He became dissatisfied with the working conditions and sought different employment but was told he was subject to a work contract from which he could be released only for military service. Friedrich was turned away from the Wehrmacht, the German Armed Forces, because he was not a German citizen. He joined the Waffen SS instead and began active duty on October 1, 1942.

In January 1943, after completing basic training, Friedrich was transferred to the Gross-Rosen concentration camp where he was assigned to the Totenkopf, or Death's Head, unit. The Death's Head unit operated and guarded concentration camps. *United States v. Negele*, 222 F.3d 443, 445 (8th Cir. 2000). Among the 100,000 prisoners at Gross-Rosen in January 1943 were civilian Jews, Poles, Russians, Ukrainians, Gypsies and

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[1] The horrors inflicted by the Third Reich on civilians imprisoned in concentration camps based upon their race, religion, national origin and other immutable characteristics are well documented in the record submitted by the government in this case, in the case law, in history, and in the memories of those who survived. Friedrich does not contest the factual record in this regard. The Court chooses not to recapitulate the facts except insofar as necessary to resolve the issue before it.

Jehovah's Witnesses. The prisoners received inadequate nutrition, clothing, and medical care and were used a slave labor in the nearby stone quarry. Nearly 1,500 prisoners died at Gross-Rosen during the first five months of 1943.

The Death's Head unit guards at Gross-Rosen rotated among several duties, including guarding the camp perimeters at night, escorting work-details to the quarry, and guarding the prisoners while at the quarry. The guards were instructed to shoot prisoners who attempted escape. Friedrich's duties were to prevent prisoners from escaping from the camp and to guard them while they worked outside the camp. Friedrich denies ever witnessing an escape. Although he always carried a loaded rifle while on duty, Friedrich denies that he ever fired his weapon.

In August 1943, Friedrich was one of about 60 guards that escorted a group of approximately 200 prisoners from Gross-Rosen to the Dyhenfurth camp. Friedrich remained at Dyhenfurth until January 1945. During that period he married and his first child was born. His duties at Dyhenfurth were much the same as they had been at Gross-Rosen.

When the Soviet Red Army advanced on Dyhenfurth in January 1945 the camp was evacuated. Friedrich was one of 100 to 150 guards who marched a group of about 1,000 prisoners back to Gross-Rosen. Friedrich testified that the march took several days during which prisoners and guards slept in open fields at night. Friedrich testified that the prisoners may not have received any food and that they had no blankets. Evidence in the record indicates that several prisoners died during the evacuation from Dyhenfurth. Friedrich denies that he observed any deaths.

Gross-Rosen was evacuated in early February 1945. Friedrich was among the detail that escorted approximately 1,000 prisoners to the Flossenburg concentration camp. He testified that the prisoners marched for about a day to a functioning railroad where they were then were loaded onto cattle cars. The rail journey took about a day and a half, during which prisoners were provided no food or sanitation facilities. Flossenburg received thousands of prisoners as other camps were evacuated. Large numbers of prisoners died as a result of inadequate food, medical treatment, and brutality.

In April 1945, Flossenburg was evacuated as Allied forces advanced. Friedrich accompanied prisoners on an evacuation march toward the Dachau concentration camp. The group was overtaken on the road by American soldiers. Friedrich testified that he and the other guards abandoned the prisoners and scattered into the woods. He discarded his rifle and dog tags immediately and, when he found other clothes to wear, he discarded his uniform.

Friedrich reunited with his wife and family in Austria, and they remained there for ten years. In 1953, he applied for a visa to the United States through the National Council of Churches. His visa application stated that he was in the Romanian army from 1941 to 1942, and the German Army from 1942 to 1945. The application made no mention of his service with the Waffen SS or his duty at the concentration camps. Friedrich traveled to the United States Embassy in Salzburg, where he was interviewed by several people from different agencies. Friedrich testified that he was not asked whether he had served in the SS and he did not volunteer that information. On February 10, 1955, U.S. State Department Vice Consul David Jelinek issued Friedrich a visa. Jelinek testified at deposition that he would not have issued Friedrich

the visa if he had known that Friedrich had served as a concentration camp guard. Friedrich was naturalized on May 4, 1962, by the United States District Court for the Eastern District of Missouri and received Naturalization Certificate No. 8497460.

In opposing summary judgment, Friedrich does not dispute the government's evidence regarding the conditions at the three camps where he was a guard. Rather, Friedrich disputes what he terms the government's "implication" that he personally whipped, beat, tortured, abused, and shot any prisoners. The record contains no testimony linking Friedrich to specific acts of brutality and the government does not make any contention that he engaged in such acts.

III. Discussion

The issue before the Court at this stage is whether Friedrich's acknowledged service as an armed concentration camp guard while a member of the Death's Head unit rendered him ineligible for the visa he received under the RRA. Friedrich argues that the government cannot prevail in the absence of evidence that he personally engaged in acts of persecution.

The right to acquire American citizenship is precious, and once acquired, its loss can have severe consequences. *Fedorenko v. United States*, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981); *Costello v. United States*, 365 U.S. 265, 269, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961). The government's burden of proof in a proceeding to divest a naturalized citizen of his citizenship is accordingly a heavy one. *Fedorenko*, 449 U.S. at 505; *Costello*, 365 U.S. at 269. The evidence justifying revocation of citizenship must be "clear, unequivocal, and convincing," and may not "leave the

issue in doubt." *Fedorenko*, 449 U.S. at 505 (internal quotations and citations omitted). At the same time, Congress alone has the constitutional authority to prescribe rules for naturalization, and courts must insist on strict compliance with all congressionally imposed prerequisites to the acquisition of citizenship. *Id.* at 506.

Title 8 U.S.C. § 1451(a), provides in pertinent part as follows:

> It shall be the duty of the United States attorneys . . . to institute proceedings . . . in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

The government asserts that Friedrich's naturalization was "illegally procured."[2] Among the requirements for naturalization is "lawful admission" for permanent residence. 8 U.S.C. § 1427. Friedrich gained admission to the United States pursuant to the Refugee Relief Act of 1953 (RRA), Pub. L. No. 203, 67 Stat. 400 , as amended 68 Stat. 1044

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[2] Friedrich's argument that the Court should deny summary judgment based upon the reasoning in *United States v. Negele*, 1999 U.S. Dist. LEXIS 22647, No. 4:97-CV-1810 (E.D. Mo. Mar. 31, 1999), is unavailing. In that case, the government sought denaturalization under the misrepresentation prong of § 1451(a). The district court concluded that material factual disputes regarding what Negele told the visa examiners precluded summary judgment.

(1954). Section 14(a) of the RRA provided that no visa would be issued to persons "who personally advocated or assisted in the persecution of any person . . . because of race, religion, or national origin." The government contends that Friedrich's service in the Waffen SS rendered him ineligible for a visa under the RRA. If the government is correct and Friedrich's RRA visa was invalid, then he was not lawfully admitted for permanent residence. 8 U.S.C. § 1181(a)(1) (no immigrant shall be admitted into the United States without a valid unexpired immigrant visa). Absent lawful admission to the United States, Friedrich's citizenship was illegally procured. 8 U.S.C. § 1427(a)(1) (naturalization requirements), § 1451(a). *United States v. Dailide*, 227 F.3d 385, 390 (6th Cir. 2000); *United States v. Negele*, 222 F.3d 443, 447 (8th Cir. 2000).

Much of the case law supporting the government's position involves persons who obtained naturalization after entering the United States on visas issued pursuant to the Displaced Persons Act (DPA), 62 Stat. 1009 (1948). See, e.g., *Fedorenko*, supra (petitioner who concealed service as concentration camp guard ineligible for visa under DPA and thus citizenship was illegally procured); *United States v. Szehinskyj*, 277 F.3d 331 (3d Cir. 2002) (same); *Dailide*, supra (same); *Negele*, supra (same); *United States v. Breyer*, 41 F.3d 884 (3d Cir. 1994); *United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991); *United States v. Tittjung*, 753 F. Supp. 251 (E.D. Wis. 1990), aff'd, 948 F.2d 1292 (7th Cir. 1991). The DPA enabled European refugees driven from their homelands by World War II to emigrate to the United States without regard to the usual immigration quotas. *Fedorenko*, 449 U.S. at 495. The Act excluded from relief individuals who had "assisted the enemy in persecuting civilians" or who had "voluntarily assisted the enemy forces . . . in their operations." *Id.* at n.3, n.4 (quoting the DPA and Annex I to

the Constitution of the International Refugee Organization of the United Nations, ratified by the United States on December 16, 1946, 62 Stat. 3051-52).

Friedrich argues that differences between the language of the DPA and the RRA dictate that the government cannot rely on the fact of his Waffen SS service as a concentration camp guard alone. The RRA excludes from eligibility those persons "who *personally* advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Pub. L. No. 203, 67 Stat. 400, as amended, 68 Stat. 1044 (1954) (emphasis added). Friedrich argues that the modifier "personally" places upon the government the "higher" burden to establish that he subjectively intended to engage in persecution by proving that he committed individual acts of persecution "such as whipping, beating, etc.". The government counters that both the plain language and legislative history indicate that Congress included the word "personally" in the RRA to ensure that individuals were excluded from the United States based upon their own conduct, rather than mere membership in an organization. Furthermore, the government contends, service as a concentration camp guard is sufficient to qualify as persecution without proof of individual acts of a more extreme nature.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003) (quoting *United States v. Albertini*, 472 U.S. 675, 680, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985)). Where, as here, the statute does not define a word, the Court looks to the ordinary, common sense meaning. *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999). "Personal," as

defined by Black's Law Dictionary, (5th Ed. 1979), means "Appertaining to the person; belonging to an individual . . ." The Random House College Dictionary, Rev. Ed. (1980) defines "personally" as "as regards oneself, [] as an individual. . ." In the context of the RRA, "personally" targets the advocacy or assistance in persecution committed by the individual rather than the group of which the individual is a member. Nothing in the definition of "personal" supports Friedrich's construction of the RRA as requiring proof of his subjective intent to persecute others. Nor does the word "personally" equate with "more egregious," or "more specific" acts of persecution, such as whipping, beating, or killing others, as Friedrich suggests.

Under the RRA's predecessor statute, the DPA, refugees were denied visas based on their membership in a group "hostile to the United States." The DPA as enacted in 1948 limited visas to those persons who were defined as refugees by the IRO; the IRO explicitly excluded from the definition of refugees persons who "assisted the enemy in persecuting civil populations." *Fedorenko*, 449 U.S. at 496 n.3, n.4. The DPA was amended in 1950 to state:

> no visas shall be issued under the provisions of this Act . . . [1] to any person who is or has been a member of or participant in any movement hostile to the United States . . ., or [2] to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin.

United States v. Koreh, 59 F.3d 431, 438 (3rd Cir. 1995) (quoting DPA § 13, 64 Stat. at 227) (numbers added) . The "hostile movement" prohibition did not require proof of personal participation in acts hostile to the United States; voluntary membership in an organization hostile to the United

States, regardless of the degree of the individual's participation, was sufficient to disqualify an individual from obtaining a visa under the DPA. *Id.* at 444-45 (citing *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981)).

The RRA, enacted in 1953, (1) deleted the "hostile movement" disqualification and (2) added the word "personally" to the provision disqualifying those who "advocated or assisted in persecution." The effect of the first of these modifications was to remove the prohibition against issuing visas to aliens based solely upon their membership in organizations deemed hostile to the United States. The second modification emphasized the first by explicitly stating the ineligibility of those who individually advocated or assisted in the persecution. See H.R. Rep. No. 1452, 95th Cong., 2d Sess. at 5 (1978) (Report on the Holtzman Amendment to the Immigration and Nationality Act) ("Section 13 of the Displaced Persons Act of 1948 , . . ., and Section 14(a) of the Refugee Relief Act of 1953 prohibited the admission of aliens under those statutes who had 'advocated or assisted in the persecution of any person . . . because of race, religion or national origin.'").[3]

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[3] The purpose of the Holtzman Amendment was to ensure that the INA excluded from admission, and facilitated the deportation of, "any aliens who have persecuted any person on the basis of race, religion, national origin, or political opinion." H.R. Rep. No. 1452 at 1. The vast majority of naturalized citizens determined to be Nazi war criminals were deportable as having concealed material facts in applying for visas under the DPA or RRA. *Id.* at 3. However, at least two such war criminals had been admitted under the INA of 1952, which did not expressly preclude admission based upon persecution. *Id.* at 2-3. These individuals thus were not deportable under existing law.

The Court finds no support for Friedrich's argument that by adding the word "personally" to the RRA, Congress intended to require a showing of his subjective intent to persecute or that he engaged in acts causing specific harm to individuals. Friedrich served as an armed guard at three concentration camps housing civilians imprisoned under inhumane conditions based upon their race, religion or national origin. His job was to make sure they remained imprisoned. Friedrich's service, even in the absence of any evidence that he personally committed atrocities against these individuals, qualifies as "advocating or assisting in persecution." *United States v. Szehinskyj*, 277 F.3d 331, 339 (3d Cir. 2002) ("By definition -- and . . . clear, unequivocal, and convincing evidence -- the Totenkopf [at Gross-Rosen] assisted in the persecution of Jews and others considered racially inferior." (internal quotations omitted)). *See also Naujalis v. INS*, 240 F.3d 642, 647 (7th Cir. 2001) (Lithuanian soldier who admitted guarding vital railroad facility assisted Nazi-directed persecution); *Schmidt*, 923 F.2d at 1258 ("It is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA."); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986); *United States v. Kairys*, 782 F.2d 1374, 1377 n. 3 (7th Cir. 1986) (service as Nazi concentration camp guard, without proof of personal involvement in atrocities, established persecution for purposes of DPA).

Friedrich also suggests that, under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), the Court must give deference to the eligibility decision of the vice consul who issued his visa. Under Chevron, courts "defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996) (quoting

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996)). "The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation." *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996). This case does not require the Court to review the formal decision of the State Department regarding the interpretation of a vague statute following formal administrative proceedings. What is at issue here is the vice consul's decision regarding the proper application of an unambiguous statute to an individual who failed to provide complete factual information. *Chevron* does not apply under these circumstances.

Friedrich argues that citizenship is not necessarily illegally procured because an individual received "an otherwise valid visa" under improper circumstances. He cites *In re Ayala-Arevalo*, 22 I. & N. Dec. 398, No. A42989249 (Brd. Imm. App. Nov. 30, 1998), in support of this position. *Ayala-Arevalo* involved an alien's attempt to obtain relief from deportation after he was found to be excludable at entry as a result of a fraud conviction. *Id.* at 3. *Ayala-Arevalo* argued that he was entitled to a waiver of inadmissibility under § 212(h) of the INA, 8 U.S.C. § 1182(h), because, he said, the Act distinguished between (a) persons who were lawfully admitted but later determined to have concealed their inadmissibility and (b) persons who were indeed lawfully admitted. The Board of Immigration Appeals (BIA) declined to make the requested distinction between the categories of those "lawfully admitted." The statute at issue in Ayala-Arevalo and the BIA's analysis simply have no bearing on this case. *See United States v. Negele*, 1999 U.S. Dist. LEXIS 22647, No. 4:97-CV-1810 (ERW) (E.D. Mo. Feb. 26, 1999), at 9 n.4 (rejecting argument that BIA findings regarding waiver of inadmissibility found at 8 U.S.C. § 1182(h) were

applicable in making determination regarding visa eligibility under DPA).

In summary, the Court concludes that Friedrich's service as a concentration camp guard while serving in the Waffen SS rendered him ineligible for the visa he obtained pursuant to the RRA. As a consequence, Friedrich was not lawfully admitted to the United States and the order admitting him to citizenship and the certificate of naturalization were illegally procured under 8 U.S.C. § 1451(a).

Accordingly,

IT IS HEREBY ORDERED that the government's motion for summary judgment [# 22] is **granted**.

IT IS FURTHER ORDERED that the order of this Court dated May 4, 1962, admitting defendant Adam Friedrich to United States citizenship, is revoked and set aside, and Naturalization Certificate No. 8497460, issued on May 4, 1962, to defendant Adam Friedrich, is canceled.

IT IS FURTHER ORDERED that, upon receipt of this order, defendant Adam Friedrich shall surrender Naturalization Certificate No. 8497460 and his United States passport, if he has one, to the Attorney General.

A separate judgment in accordance with this memorandum and order shall be entered this same date.

/s/ CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 24th day of February, 2004.